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IN THE

Supreme Court of the United States

OCTOBER TERM, 19 61

(Consolidated Cases)

LUCIA BONSALL, ET AL
versus — Petitioners
HUMBLE OIL & REFINING COMPANY
Respondent

JAMES CLEMENT, as dative tutor for Wilson Conner, Minor
versus — Petitioner
HUMBLE OIL & REFINING COMPANY
Respondent

PREVATE BROUSSARD
versus — Petitioner
HUMBLE OIL & REFINING COMPANY
Respondent

LEVIA DUHON
versus — Petitioner
HUMBLE OIL & REFINING COMPANY
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

Jerry G. Jones,
J. B. Jones, Jr. and
Robert McHale
Of Counsel

C. A. Miller, Jr. and
Robert McHale
Of Counsel

JONES AND JONES
ROGERS & McHALE
Attorneys for Petitioners in
Lucia Bonsall, et al, James
Clement and Prevate Broussard
Cameron, Louisiana

C. A. MILLER, JR.
ROGERS & McHALE
Attorneys for Petitioner in
Levia Duhon
Pioneer Building
Lake Charles, Louisiana
COUNSEL FOR PETITIONERS

LECOMTE, SHREVEPORT, LOUISIANA

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Petitioners

versus

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Respondent

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JONES & JONES
Cameron, Louisiana

C. A. MILLER, JR.
Pioneer Building
Lake Charles, Louisiana

ROGERS & McHALE
2225 Moeling Street
Lake Charles, Louisiana

ATTORNEYS FOR PETITIONERS

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, LUCIA BONSALL, born Broussard, ARMELIAN BROUSSARD, DORESTAN BROUSSARD, FERDINAND BROUSSARD, LEVAN BROUSSARD, EDWINA RUTHERFORD, born Broussard, LEDIA THERIOT, born Broussard, MAYOLA WICKE, born Broussard, JAMES CLEMENT, as dative tutor for Wilson Conner, Minor, PREVATE BROUSSARD and LEVIA DUHON, respectively pray that a writ of certiorari be issued out of and under the seal of this Court to review the decision of the United States Court of Appeals for

the Fifth Circuit, rendered on February 26, 1962, rehearing denied March 27, 1962, affirming a judgment of the United States District Court for the Western District of Louisiana dismissing petitioners complaint on the merits.

JURISDICTION OF THIS COURT

Jurisdiction to review this case upon writ of certiorari is conferred upon this Court by *28 U.S.C.: 1254(1)*. The opinion of the Court of Appeals for the Fifth Circuit was filed February 26, 1962. Application for rehearing was timely filed by petitioners herein and was denied by order filed on March 27, 1962.

JURISDICTION OF COURTS BELOW

These cases were filed in the Fourteenth Judicial District Court for the Parish of Cameron, Louisiana, and on June 16, 1960, timely removed by defendant to the United States District Court for the Western District of Louisiana, Lake Charles Division, where they were consolidated for trial. That Court had jurisdiction by virtue of the diversity of citizenship of plaintiffs (all Louisiana citizens) and defendant (a corporation which is organized under the laws of the State of Delaware and does not have its principal place of business in the State of Louisiana). The amount in controversy in each case, exclusive of interest and costs, is in excess of $10,000. Trial was had in District Court and that Court ruled that defendant was entitled to judgment. Appeal was taken to the United States Court of Appeals, Fifth Circuit, which affirmed the decision of the District Court.

OPINIONS BELOW.

The opinion of the district court is reported in 201 F. Supp. 516 and is also printed in the record (R. 644).

The opinion of the court of appeals appears in ..... F. 2nd ..... and is also printed in the record (R. 692).

Order denying petition for rehearing is printed in the record (R. 712).

QUESTIONS PRESENTED

The questions presented by the petition are:

(1) Whether the failure to pay production royalties by an oil and gas mineral lessee to its lessor for a period of 20 months and 5 days after production was an active breach of the lease contract.

(2) If the answer to the foregoing is in the affirmative, then whether a mineral lessor is entitled to cancellation or forfeiture of the mineral lease because of said failure to pay.

(3) Whether the excuses offered by the mineral lessee in this case for its failure to pay production royalties for a period of 20 months and 5 days after production are justifiable excuses under the law or the lease contract. This question may be also presented as: Whether this mineral lessee, under the circumstances, had the right in law or under the terms of the lease contract to withhold production royalties due its mineral lessor for a period of 20 months and 5 days.

STATEMENT OF MATTERS INVOLVED

Petitioners granted identical oil, gas and mineral leases covering their separately owned tracts of land in Cameron Parish, Louisiana to Albert D. Miller, who shortly thereafter assigned these leases to Humble Oil & Refining Company, respondent herein, (lease page 19 of Record).

On July 26, 1956 and September 5, 1956, under authority of Paragraph 4 of the lease, Humble, by unit declaration instrument (R. 38 and 43), created Cheniere Perdue Gas Unit No. 1. Portions of the acreage included in petitioners leases were included within the boundaries of this declared unit. (The unit is graphically shown on Plat 1 attached to this petition) Humble began drilling on November 12, 1956 within the limits of this unit its well No. 1 (but not on petitioners lands), which was completed on March 5, 1957 as a well capable of producing gas and condensate in commercial quantities, but was shut-in for lack of an available market.

On June 12, 1958, again under authority of Paragraph 4 of these leases, Humble, by unit declaration instrument, created Cheniere Perdue Gas Unit No. 2, and began drilling a well thereon on July 6, 1958, which was completed on August 16, 1958 as a dry hole. Portions of the Prevate Broussard and Levia Duhon leases were included in this unit. (This unit is graphically shown on Plat 1 attached to this petition)

Prior to the drilling of Well No. 1, plaintiffs' leases were being maintained by defendant by the pay-

ment of delay rentals, these rentals having been deposited in the Gulf National Bank of Lake Charles, Louisiana, to the credit of lessors for the years beginning August 1, 1954, August 1, 1955, and August 1, 1956. No delay rentals were paid to plaintiffs, or their ancestors in title, after the payment on August 1, 1956, which covered the period from August 1, 1956 to August 1, 1957. However, on May 23, 1957, Humble began the payment of shut-in royalty to plaintiffs, or their ancestors in title, the first such check being for the period May 25, 1957 to June 25, 1957, and in like manner, monthly, through the period October 25, 1958. After this payment for the period ending October 24, 1958, no further shut-in gas royalty payments were ever sent to plaintiffs.

In the meantime, Austral Oil Company had drilled several successful gas wells for its account in the same area as Humble's Well No. 1 on adjoining lands belonging to others. Effective September 1, 1958, the Commissioner of Conservation of the State of Louisiana, pursuant to authority granted him by Louisiana law, issued Orders Nos. 430, 430-A, 430-B and 430-C (R. 46, 51, 56 and 60). Under the provisions of these orders, production units were created for the production from the "D", "G", "H" and "I" sands, which sands covered portions of some of petitioners lands. The "I" Unit sand was the sand found in Humble's Cheniere Perdue Gas Unit No. 1, Well No. 1. All other sands were found in wells drilled by Austral on adjoining lands (D, G, H & I unit sands, location of wells, location of petitioners' lands are shown on Plats 1, 2, 3 & 4 attached to this petition.)

The first run of gas and condensate from the "D", "G" and "H" Sand Units was on *September 1, 1958*, and production in commercial quantities has continued from these units to date. (R. 642)

The first production of gas and condensate from the "I" Sand Unit was had on April 2, 1959, and production in commercial quantities continued until December 12, 1959. (R. 642) Although this production (and sales thereof) existed from these units beginning *September 1, 1958*, defendant Humble did not offer or tender plaintiffs' shares thereof until *May 5, 1960*, or a lapse *20 months and 5 days*, and then only after plaintiffs' attorneys wrote letters to Humble demanding the cancellation of the leases in question. The tender made on May 5, 1960, was in the form of two separate sets of checks to each plaintiff in different amounts with instructions for plaintiffs to choose the check which they desired to accept and negotiate as payment for royalties past due. These checks were not cashed by plaintiffs, and defendants were informed that it would be fruitless to tender any further checks, as plaintiffs considered that the leases in question were no longer in full force and effect because of the failure to timely pay royalties. (R. 637 et sub)

The district court's opinion held that the failure to pay royalties for 20 months and 5 days after due date is a passive breach of a lease contract as opposed to an active breach thereof, and, accordingly, in order for the mineral lessor to have cancellation he must first make formal demand (either in writing or orally in the presence

of two witnesses) that the mineral lessee pay production royalties that the mineral lessor was all along rightfully entitled to. (Petitioners' attorney had orally demanded on two occasions the payment of royalties, but not in the presence of two witnesses.) (R. 261) For this legal principle, the court relied on a prior Western District of United States opinion in *Touchet v. Humble Oil & Refining Co.*, 191 Fed. Supp. 291, and two decisions of the Louisiana Supreme Court entitled *Melancon v. The Texas Co., et al*, 230 La. 593, 89 So. 2d 135 (1956) and *Bollinger v. The Texas Co., et al*, 95 So. 2d 132, 232 La. 637 (1957).

After the District Court's opinion was written, but before it was rendered the Court of Appeal of Louisiana handed down the decision of *Bailey v. Meadows*, 130 So.2nd 501 (1961). In Bailey the organ of the court in effect held that the *Melancon* and *Bollinger* (supra) decisions stood for the proposition that the *failure by a mineral lessee under an oil and gas lease to pay production royalties for any appreciable length of time without justification amounts to an "active breach" of such lease, which entitles the lessor to a cancellation thereof without the necessity of placing the lessee in formal default.* The delay in *Bailey* was 18 months.

The district court, while observing that *Bailey* was not yet final as writs to the Louisiana Supreme Court had been asked, proceeded to hold that under the total circumstances Humble was justified in withholding royalties for 20 months and 5 days without examining the excuses offered by Humble in light of the law and the terms of the lease contract.

Petitioners then appealed this case to the United States Court of Appeals for the Fifth Circuit, and during the interim *Bailey v. Meadows*, (supra) became final as the Louisiana Supreme Court denied application for writs. The United States Court of Appeals, Fifth Circuit, even in view of the *Bailey* case, in a per curiam affirmed and adopted the district court's decision.

While the United States Court of Appeals, Fifth Circuit was considering petitioners application for rehearing, the Louisiana Court of Appeal, Third Circuit, decided the case of *Pierce v. Atlantic Refining Co.*, 140 So. 2d 19 (1962). In *Pierce* (on all fours with these cases) the delay was only 7 months. Plaintiffs submitted the *Pierce* case to the Court. The United States Court of Appeal, Fifth Circuit, nevertheless denied application for rehearing.

The excuses offered by Humble for failure to pay production royalties have no basis in law or the provisions of the lease contract and have actually been rejected by the highest courts of Louisiana.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals and District Court erred as follows:

On the first 2 questions:

A. In holding that the failure by respondent oil company to pay production royalties for a period of 20 months and 5 days was a passive breach of its mineral leases, thereby requiring

petitioners to make formal demand for monies rightfully due them all along before being entitled to cancellation of said leases.

B. In holding that petitioners were not entitled to cancellation for the failure by respondent oil company to pay production royalties for a period of 20 months and 5 days.

On the third question:

A. In holding that respondent oil company was legally justified in withholding royalties rightfully due plaintiffs.

B. In holding that respondent oil company had the right in law or under the terms of the lease contracts to withhold royalty payments to plaintiffs.

REASONS RELIED ON FOR GRANTING THE WRIT

The Decision Below is in Direct Conflict with Applicable Decisions of the Highest Courts and Statutes of Louisiana in Field of Law Most Vital to the Interest of the Landowners of this State.

The highest courts of Louisiana have in royalty payment cases set the standard for protection of mineral lessors to be:

(1) As said in *Pierce v. Atlantic Refining Co.*, CA La. 3rd Circuit (1962) 140 So. 2d 19:

". . . however, we also agree with plaintiff that the rights of the lessor to collection of his rent or royalty cannot be jeopardized by the "large" transactions and/or whims of the lessee."

(2) And as in *Bollinger v. The Texas Company*, 232 La. 627 (1957), 95 So.2d 132:

> "Plaintiff had the right to be paid in accordance with the method provided by the terms of the lease —not at the whim of defendant. Where the whim of defendant could or might affect a lessor's rights under a lease, courts should always (as we are doing here) intervene to protect those rights."

It is now common knowledge that oil and gas constitutes the major wealth of Louisiana and it is this great natural resource that holds the economic future of our state. The highest courts of Louisiana with far reaching wisdom have applied the provisions of the Louisiana Civil Code to this field of law with a view in mind of protecting the interests of the landowners, by and large like petitioners, common country folk (one of petitioners is a minor, another signs his name by making a cross mark), from the whim, caprice or bureaucracy of large oil companies. This decision, without doubt, establishes a separate rule for the Courts of the United States as opposed to those of Louisiana, and will result in wholesale removal by mineral lessees to the United States District Courts in an effort by oil companies to escape the responsibilities placed upon them by the Supreme Court of Louisiana. Surely, this is not the intent of and is opposed to *Erie Railroad Co. v. Tompkins* (1938), 304 U. S. 64, 58 S. Ct. 817.

ARGUMENT

Proposition 1.

The Court erred in holding that, under the circumstances, the failure to pay production royalties by defendant for a period of 20 months and 5 days was a passive breach (as opposed to an active breach) of the lease contract, and, consequently, that it was necessary to put defendant in default prior to asking for a cancellation of the lease.

AUTHORITIES:

Melancon v. The Texas Company, et al, 230 La. 593, 89 So.2d 135 (1956);

Bollinger v. The Texas Company, et al, 95 So.2d 132, 232 La. 637 (1957);

Bailey v. Meadows, 130 So.2d 501 (1961) Writs to Louisiana Supreme Court filed June 26, 1961 and denied June 29, 1961.

Pierce v. Atlantic Refining Co. 140 So.2d 19 (1962).

The Supreme Court of Louisiana in 1956 in the case of *Melancon v. The Texas Company et al*, supra, and in 1957 in *Bollinger v. The Texas Company, et al*, supra, held that the *failure by a mineral lessee to pay production royalties for an undue length of time without justification was an active breach of the lease, resulting in its forfeiture.* Since the breach was an *active* one, as opposed to a *passive* one, no demand for payment was called for or necessary under any circumstances. The statutes and prior court decisions were reviewed in

Melancon by Chief Justice Fournet and the law of Louisiana stated as follows:

"(1, 2) In the system of interpretation of oil and gas contracts which this Court has followed for many years, the lessor's royalty under the usual oil and gas lease is placed in the rent category. Such a characterization is well fixed in our law (see Milling v. Collector of Revenue, 220 La. 773, 57 So.2d 679, containing a summary and analysis of pertinent cases), and has given little trouble since this Court's pronouncement of more than three decades past that "* * * a mine or quarry, or land adapted to mining or quarrying, may be leased for a certain portion of the produce of such mine or quarry, and the fact that such portion is called 'royalty', instead of rent, is not of the lease consequence". Logan v. State Gravel Co., 158 La. 105, 109, 103 So. 526, 527. The rule is equally well established that in construing mineral leases, "* * * the codal provisions applicable to ordinary leases must be applied." Coyle v. North American Oil Consolidated, 201 La. 99, 114, 9 So.2d 473, 478; Tyson v. Surf Oil Co., 195 La. 248, 196 So. 336.

(3) The provisions of the LSA-Civil Code treating of the subject of lease, to be found under Chapters 1 and 2 of Title IX, Book III and particularly those under the general heading "of the Obligations and Rights of the Lessee", stipulate that "The lessee is bound * * * 2. To pay the rent at the terms agreed on", Article 2710, and if he fails to pay the rent when due, he may be *expelled from the property*, Article 2712. Rent is, from the standpoint of the lessor, the *primary motive* for the contract, and was so recognized in the early case of Kron v. Watsoh, 14 La. Ann. 432, when this Court

held that "The payment of rent, in puruance of the terms of the contract of lease, is an essential engagement on the part of the lessee, and his *non-compliance* with it gives to the lessor a right to sue for the *dissolution of the contract.*" Other provisions of the LSA-Civil Code, pertinent because under our law lease "is a synallagmatic contract, to which consent alone is sufficient * * *", Article 2669, are found in the section treating "Of Conventional Obligations", Title IV, Book III; therein it is stated that "When no term is fixed by the parties for the performance of the obligation, it may be executed immediately, unless, from the nature of the act, a term, either certain or uncertain, must be implied * * *", Article 2050; equity, usage and law may be resorted to in such cases, Article 1964; the word "usage" is defined as "that which is generally practiced in affairs of the same nature with that which forms the subject of the contract. House rent in some cities is generally paid by the month; in others by the quarter. In a contract for the hire of a house, without expressing when the rent was to be paid, the deficiency would be supplied by proof of the usage, * * *." Article 1966.

(4, 5) In the case of royalty based on gas and oil production it is the accepted custom, as reflected by this very record, to make such payments on a monthly basis, computed on the amount of gas and oil sold or run into the line from the well. A justifiable cause for delay in such payment might arise when there is a reasonable dispute as to those entitled to receive the royalties, or the amount due each, but no such factual situation is here presented, and we agree with the trial judge that *a delay of fifteen months for no valid reason is unjustifiable* and violative of the terms of the contract.

A perusal of the several cases relied on by the defendant clearly shows that they are inapposite from a factual standpoint and therefore not controlling here.

(6, 7) Defendant's contention that there was no "formal demand", that such demand is a necessary preliminary to a refusal to pay, and that in its absence the forfeiture would not be warranted, is not persuasive in the face of the finding of the trial judge, and of our confirmation of his finding, of the defendant's active violation of its obligations under the lease. LSA-Civil Code, Article 1932; Rosenthral v. Baer, 18 La. Ann. 573; Noel Estate, Inc. v. Louisiana Oil Ref. Corp., 188 La. 45, 175 So. 744." (Emphasis ours)

Almost one year later in *Bollinger v. The Texas Company, et al*, supra, this principle was reaffirmed by Justice Hamlin with the following language:

"Plaintiff urges that *it is not the amount* of the royalties which is determinative of the right of cancellation and forfeiture, but that it is the failure on the part of the Lessee *to pay any amount* of production royalties without a proper excuse for such non-payment.

"In the Melancon case, supra, we held that the codal provisions which apply to ordinary leases are also applicable to mineral leases; and that in the case of royalty based on gas and oil production, it is the accepted custom to make such payments on a monthly basis, computed on the amount of gas and oil sold or run into the line from the well. We further stated that a justifiable cause might exist for delay in such payment, when there is a reason-

able dispute as to those entitled to receive the royalties. In the instant case, the record discloses that there was no dispute as to those to whom royalties were due.

"(1 - 3). A Lessee must comply with his lease terms. Whether production payments are larger or smaller than "shut-in" payments, they must be paid on accurate computations and as such. Plaintiff had the right to be paid in accordance with the method provided by the terms of the lease — *not at the whim or caprice of the defendant. Where the whim of defendant could or might affect a Lessor's rights under a lease, courts should always* (as we are doing here) *intervene to protect those rights.*"
(Emphasis ours)

In *Melancon* the delay was fifteen months, here the delay is 20 months and 5 days.

Then, on May 5, 1961, came *Bailey v. Meadows*, supra, a unanimous opinion of the 2nd Circuit Court of Appeals of Louisiana, and there Judge Bolin again extensively reviewed the statutes and decision of the courts, placing particular emphasis on the meaning and effect of *Melancon and Bollinger*. The rule of decision of these cases was firmly, and once and for all, found to be as follows:

"Appellees contend the Melancon and Bollinger cases are clearly distinguishable from the instant case on the facts and the language used. We must confess the court said in the Melancon case that the facts therein justified finding a formal demand had been made "if it were necessary", but this was pure surplusage and dictum. We are also mindful that the

court found the refusal to pay the royalties in the Melancon case was a part of an apparent scheme to pressure or force the lessors into signing a unitization agreement. However, such a finding by the court did not alter the clear and unmistakable principles of law enunciated in its opinion, from which we have extensively quoted.

"(2, 3) We are, therefore, of the opinion that the Melancon and Bollinger cases have enunciated a general rule that *failure to pay production royalties under an oil and gas lease, for any appreciable length of time, without justification, amounts to an active breach of such lease which entitles the lessor to a cancellation thereof without the necessity of placing the lessee in formal default.* Applying this principle of law to the instant case, we are relegated to deciding whether this record reflects any justification for the appellees' refusal to pay the royalties for a period of approximately 18 months. Having found no such justification, we are of the opinion that the lower court was in error in rejecting the demands for cancellation of the leases." (emphasis ours)

Writs of Review were taken in *Bailey v. Meadows* to the Louisiana Supreme Court and denied on the 29th day of June, 1961, thus placing their stamp of approval on this case.

In *Bailey* there was no demand and the delay was approximately eighteen months.

In *Pierce v. Atlantic Refining Co.*, supra, the Third Circuit reviewed the above cases, affirmed them and held that a delay of seven months was unreasonable and allowed cancellation.

Since here a greater length of time has expired than in *Melancon, Bollinger, Bailey* and *Pierce, as a matter of law; the* "appreciable length of time" portion of the general rule is met and we have an active breach of the lease and no formal demand is necessary to be entitled to cancellation, unless there was legal justification for the long delay.

Proposition 2.

The Court erred in holding that, under the circumstances, respondent oil company was legally justified in withholding royalties from plaintiffs.

AUTHORITIES:

Melancon v. The Texas Company, et al, supra;

Bollinger v. The Texas Company, et al, supra; *Bailey v. Meadows,* supra;

Pierce v. The Atlantic Refining Co., supra;

Irion v. Standard Oil Company of Louisiana, 6 So.2d 143, 199 La. 363 (1942);

Parker, et al v. Ohio Oil Company, 191 La. 896, 186 So. 604 (1939); and

S. E. Johnson, Sr. v. Leroy Smallenberger, 237 La. 11, 110 So.2d 119; and

State ex rel. Brown v. United Gas Public Service Co., (1941) 197 La. 616, 2 so.2d 41.

Defendant, apparently realizing they had breached their obligations under the lease contract by failing to timely pay royalties, tried to establish a legal justification for their actions. The District Court in the final

portion of its opinion took the position that the "total circumstances" of the case revealed justification, as a matter of law. And it is here, with all due respect to Judge Hunter, that we have our greatest quarrel, for based on his own previous findings of fact, as a matter of law in these cases there existed no legal justification.

Let us then examine the *reasons* offered by defendant.

(1) Humble paints a long detailed picture of its bureaucracy in determining how much was due, i.e. surveys, title opinions, division orders, etc.; all of which took from September 1, 1958 to August 24, 1959, almost a whole year just to determine the amount of royalties due. We will not burden this Court with these many details. They consume much of the record. Suffice it to say that Judge Hunter correctly rejected this reason when he said:

> "We agree with plaintiffs that what Humble did from 9/1/58 to 8/24/59 in the way of title examinations, surveys, etc. could have actually been accomplished in a *much shorter time*." (Emphasis ours) (Tr. 655)

This then was not a legal justification and anyway royalties were not tendered until the next May 5th, in 1960.

Further, as a matter of law, *Pierce v. Atlantic Refining Co.*, supra, held that taking 7 months to do this was unreasonable.

(2) Possibly defendant will argue that they could not pay because Austral held them up and did not send them any funds until August 1959, since Humble is merely in these cases participating by unitization in wells drilled by Austral on lands of others. But this condition and excuse was present in *Bailey v. Meadows*, supra, and, as a matter of law, rejected in the language of Judge Bolin as follows:

> "The appelles give as their excuse for such delay the negotiations they were having with Southern Natural Gas Company, as the operator of the unit. . . *The reasons for delay as given by the appellees, do not favorably impress us.*" (Emphasis ours)

Transactions among the lessee interests was also, as a matter of law, rejected in *Pierce v. Atlantic Refining Co.*

(3) Next, defendant claims that, since their law department could not determine whether the Commissioner's units superceded the declared units, they had the right to withhold *all* payment to lessors.

In this connection, Humble contends that it filed two suits in Acadia Parish, Louisiana to have this so-called legal issue resolved. This they say gives them the *right to withhold all* royalties unless lessors agree to some conditional method of payment. Their division order and letter of August 24, 1959, is in plain language a statement to these lessors to the effect that "I, Humble, have your money, some of which belongs to you without question, but I am withholding all until you agree to a con-

ditional method of payment." As a matter of law, they did not possess the right to withhold royalties. The lease contract (Tr. 32) says of the right to withhold:

> ". . . and in the event the land above described, any part thereof, or an interest therein or in the royalties payable hereunder is *claimed by others*, Lessee shall have the right to withhold without liability for interest thereon payment of royalties on production therefrom or to deposit such royalties in the registry of a court of competent jurisdiction until a final determination of lessor's rights." (emphasis ours)

But never at any time was any part of this royalty "claimed by others". Therefore, this provision does not apply here.

The Louisiana statutes say of the right to withhold: L.R.S. 30:105

> "It shall be *unlawful* for a person acquiring mineral rights from, or mineral rights under a lease by, the last record owner and holding under an instrument sufficient in terms to transfer title or for a person purchasing mineral products to withhold payment of any rentals, royalties or other sums due to a party holding an interest in the minerals, or under the lease." (emphasis ours)

L.R.S. 30:106

> "A. A person producing minerals under a lease granted by the last record owner and holding under an instrument sufficient in terms to transfer title to the land or mineral rights, shall be presumed to have derived his right from the true owner. The

lessor, royalty owner, lessee or producer or persons holding from them shall be entitled to all minerals produced or to their proceeds, unless and until a *suit* testing title of the land or mineral rights embraced in the lease is filed in the district court of the *parish in which the property is located.*

B. A purchaser of minerals produced from a recorded lease granted under these conditions shall be fully protected in making payment to any party in interest under the lease unless and until the above mentioned suit should be filed and the purchaser receives notification of it by the usual postal registry receipt card. *The purchaser shall not be entitled to this protection unless he has recorded in the conveyance records of the parish in which the land is located, notice that the minerals have been and will be bought by him.*" (emphasis ours)

The Louisiana Courts, in interpreting this Statute, have declared "unlawful" the lessee's withholding royalty payments because of an adverse claim unless and until that claim has been judicially asserted. The Supreme Court in *State ex rel. Brown v. United Gas Public Service Co.*, supra, states:

"(2, 3) Obviously, the intention of the legislature in enacting the statute was to protect lessees and purchasers in their dealings with the last record owners of lands and mineral rights and, *likewise, to protect the lessors against delays in receiving their royalties because of any defect in the title of the leased property, or because of any threat or purpose on the part of third persons to involve the title or lease itself in litigation. Actual filing of suit by such third persons is necessary to stop the*

operative effect of the terms of the act. It was so held by the Court of Appeal for the Second Circuit in the case of State ex rel. Boykin v. Hope Producing Co., 167 So. 506." (emphasis ours)

In *Irion v. Standard Oil Company of Louisiana*, supra, the Court said:

"(2) A debtor cannot legally resist payment of the debt to his creditor *merely because a third person might ultimately be recognized as having an interest in the money due.* In the instant case, Standard Oil Company does not even contend that the parties who filed instruments of record in Avoyelles Parish casting a cloud upon Irion's title have asserted any claim whatever against it. It merely says that, since these instruments were filed, it should not be forced to pay until every legal remedy afforded to the defendants in the Avoyelles Parish litigation has been exhausted notwithstanding that there has been a final judgment against them in the District Court from which no suspensive appeal was taken and notwithstanding that that judgment has been executed by the removal from the parish records of the encumbrances of which it complained.

To permit Standard Oil Company to successfully resist the claim of Irion on this ground would be to allow it to champion the rights of the defendants in the Avoyolles Parish litigation and thus produce the effect of suspending the execution of the judgment of the Twelfth Judicial District Court for one year. This we will not do." (emphasis ours)

We cannot visualize a rule that would justify withholding royalties until a Court decides some other case.

The Acadia Parish cases were filed on April 7, 1959, and *still have not decided the issue.* The Supreme Court of Louisiana only recently remanded the cases back to the District Court for joining additional parties and certainly this decision is several years yet in coming. Judge Hunter, we think, agrees:

> "We are not suggesting that a lessee can wait until every possible legal problem is resolved by the Supreme Court of Louisiana before paying royalties . . ." (Tr. 656)

> "Of course, as Mr. Jones remarked earlier in this case, when you are faced with a legal problem, you cannot wait until every possible legal problem is resolved by the Supreme Court of Louisiana before paying the royalties, you just have to ask your people and go on the advice of your legal department and if the legal department's advice is not in their opinion pretty certain, then the only thing for you to do is really to deposit the money and invoke a concursus proceedings." (Tr. 510)

However, the most glaring fault with this excuse is that there was a substantial sum of money due lessors about which even the Humble law department had no doubt. (Tr. 420) *This amount was also withheld,* contrary to the principle of *Bollinger v. Texas Co.,* supra.

And even further glaring is that this amount about which there was no question is actually the amount plaintiffs would have received according to the division orders of August 24, 1959. There was then absolutely no valid reason for withholding this amount even if we take Humble's position as correct.

(4) And finally, as a part of legal justification, defendant cries estoppel. The trial court *did not rule that plaintiffs were estopped.* Be that as it may, we believe that a lack of estoppel, as a legal justification, is the strongest point in plaintiffs' favor. Defendant suggests that plaintiffs were under some sort of obligation to reply to the famous letter of August 24, 1959, and the division orders. This would in effect require plaintiffs to *take some step or in effect make a demand for* royalties. *Melancon, Bollinger, Bailey* and *Pierce*, supra, completely refute this idea as heretofore discussed. Neither plaintiffs or their attorneys committed any act whatsoever that could possibly have the effect of "lulling" Humble into a belief that their division order would be signed. After mailing the letter and division order of August 24, 1959 by Humble, many were returned signed by others. (Tr. 412) After say thirty or sixty days, a reasonable person would have assumed that, since almost everyone else (royalty owners, overriding royalty owners, etc.) had signed, then these people (plaintiffs) were not going to sign. And, of course, lessors had no legal obligation whatsoever to sign or even read any sort of division order. The lease has no provision requiring the execution of a division order agreeing to all sorts of amendments to the lease (allowing deduction for transportation of oil and gas to some point off the premises, furnishing of indemnity bond in the event of adverse claims, ratifying units, etc.). The division order then is completely unnecessary in order to pay royalties. True, it is for the *sole convenience of the oil company.*

But, what is the real reason why Humble did not pay? It is simply that their normal procedure is to pay only after their division order is signed. (Tr. 415).

The courts of Louisiana have, as previously discussed herein in *Melancon*, *Bollinger*, *Bailey* and *Pierce*, condemned the payments of royalty at the whim or caprice of the lessee. Requiring plaintiffs to reply to the letter of August 24, 1959, or to sign division orders would place upon them the burden of asking for their royalties. As previously discussed, they, as a matter of law, have no such obligation. And a burden this is. Requiring such would mean going to an attorney's office, having the attorney study the matter, do research, write a letter, etc. . . . , all of which, with due respect to the legal profession, costs money. The lessor does not have to spend his funds to obtain what is the basic consideration or motive of the contract, namely: ROYALTY!

Consequently, it is clear that there was no *legal justification* for the withholding of the royalties. In the District Court's opinion, the following is to be noted:

> "However, lest we be misunderstood, we hasten to add that what was said in the preceding sentence would not excuse payment to the royalty owners by Humble if that payment had been demanded."

Judge Hunter clearly found that, if demand had been made by plaintiffs, the excuses which they presented would not have justified the withholding of the money! Consequently, the District Court found *no legal justification!* If this Court is to follow *Melancon*, *Bollinger* and

Pierce, then the demand found to be necessary by Judge Hunter is not required. Thus, once the District Court found an unusual delay without justification (which it did find), then the Louisiana law required that the leases be cancelled. It would be most illogical to say (and would nullify *Melancon*, *Bollinger*, *Bailey* and *Pierce*) that something is a justification if there is no demand, but not a justification if there is demand. *Bailey* and prior decisions strike out any requirement of a demand prior to asking for cancellation. Under Louisiana law, plaintiffs and their attorneys did not have the duty or opportunity to speak.

In *Parker, et al v. Ohio Oil Co.*, supra, the Louisiana Supreme Court had occasion to provide us with a detailed discussion of the doctrine of estoppel. In *Parker*, Ohio Oil had paid royalties under their lease to the tutor of the (plaintiff) minors for a considerable period. Upon the minors reaching the age of majority, Ohio was not notified by them that the future payments should be now changed and paid to them directly. Plaintiffs then sued to recover from Ohio the royalties which were paid to the tutor after the minors reached majority. In overruling the plea for estoppel filed by Ohio, the Court discussed estoppel at length, pertinent parts of which are as follows:

> "(5) As we have stated already, after these plaintiffs reached majority, they did not notify defendant of that fact, did not notify it that their father had no further authority to represent them because the tutorship was at an end, and made no demand

for payment to them direct. Nor did they complain to their father that he was exceeding his authority. They *neither said anything nor did anything*, but sat idly by and permitted their father and former tutor to collect, as "tutor", the amounts which they now claim should have been paid to them. Because of their conduct in this respect, defendant filed the special plea "that all of the plaintiffs are barred and estopped to claim from or to sue the Ohio Oil Company for any part of the sale price or value of any of the oil produced, saved and/or marketed from the S. R. Parker farm."

The trial judge overruled the plea of estoppel. His ruling was correct. It was not alleged, and it is not now contended that these plaintiffs committed any affirmative act, that they did anyhing to mislead defendant, or that they intended to mislead it.

The basis of the estoppel plead in this case is that plaintiffs said nothing, did nothing, were silent, inactive, during all the time defendant was paying to their father that which they now claim was due them. In other words, defendant's plea is that these plaintiffs are estopped by "standing by".

A discussion at large of the rules applicable to estoppel would subserve no useful purpose here. It suffices to say that there is ample authority to support the general proposition that silence and inaction may, under some circumstances, work an estoppel. This is based upon the theory that, if a man is silent when it it his duty to speak, "equity will debar him from speaking when conscience requires him to be silent."

But the rule is subject to qualification. "Mere silence will not work an estoppel. There must be some other element connected with the transaction and the silence to prevent a person from asserting his rights or claim. * * * But to effect an estoppel by silence it must also appear that the person had a full knowledge of the facts and of his rights, that he had an intent to mislead, or at least a willingness that others should be deceived, and that the other party was misled by his attitude." 10 R.C.L., Sec. 21 pp. 692, 693.

"*Mere silence of itself will not raise an estoppel. To make the silence of the party operate as an estoppel the circumstances must have been such as to render it his duty to speak, and there must also be an opportunity to speak.* And it is essential that he should have had knowledge of the facts, and that the adverse party should have been ignorant of the truth, and have been misled into doing that which he would not have done but for such silence." 21 C.J., Sec. 154, p. 1150. See, also, 16 Cyc. 759; Amer. Juris., Vol. II, Sec. 232, p. 186.

"As a corollary to the proposition that the party setting up an estoppel must have acted in reliance upon the conduct or representations of the party sought to be estopped, it is as a general rule essential that the former should not only have been destitute of knowledge of the real facts as to the matter in controversy, but should have also been without convenient or ready means of acquiring such knowledge. A public record is an available means of information as to questions of title, and one who does not take advantage of it cannot claim an estoppel against one who merely fails to furnish

such information." 16 Cyc., pp. 738, 740." (emphasis ours)

Recently, in *S. E. Johnson, Sr. v. LeRoy Smallenberger*, supra, the Louisiana Supreme Court again discussed a plea of estoppel regarding a failure to pay delay rentals. It was the court's position that silence or inaction on the part of lessor does not give rise to the operation of an estoppel.

What have plaintiffs done to mislead Humble or what affirmative steps have plaintiffs taken which would give rise to estoppel? It might be noted that, if plaintiffs were in the same or better economic and/or "business" position with Humble and had at their disposal the resources to utilize in oil and gas matters, then Humble would be in a better situation to now cry estoppel. If anything, Humble chose a pattern of conduct which should work an estoppel against it. First, Humble was possessed with all the knowledge regarding the abilities and powers to pay royalties — this was something within their exclusive knowledge. Secondly, plaintiffs were devoid of any *knowledge* which they withheld from defendants. Thirdly, when Humble was interested in some project (comingling agreements) which alone benefited Humble or the operator and it was necessary to obtain the execution of instruments in connection therewith, Humble made telephone calls to plaintiffs or their at-

torneys, sent its employees into the area on numerous occasions to have the instruments executed, and even employed a contract landman to assist in getting instruments signed. However, when the project involved was the payment of the consideration for the lease (the royalty) and Humble thought it necessary to obtain the execution of an amendment (the division orders) to the lease contract because of some alleged dispute, how did it go about seeing that these plaintiffs got their money? Humble mailed out a *form letter* and told these people what *they* were going to do pertaining to the payment of royalties. When Humble did not get a reply concerning these division orders, they claim they were misled or lulled into believing that everything was all right. *EVERYTHING WAS ALL RIGHT!* At that time Humble could have done one or two things. If they thought that plaintiffs were opposed to Humble's method of payment, then all Humble had to do was PAY. If they thought that plaintiffs did dispute the manner of payment the law afforded them an adequate remedy (concursus procedure or procedure under R.S. 30.105). Since Humble chose to follow neither course (not paying and no concursus), our only appreciation of the situation is that they were just plain unconcerned about whether of not plaintiffs got their money, all the while making use of the money themselves. Surely, it can't be said that plaintiffs are estopped. They did nothing affirmatively which would lead to this conclusion.

ATTORNEYS FEES

In the event cancellation is granted herein, there is no doubt as to the right of plaintiffs to an award for attorney's fees, under the provisions of L.R.S. 30:102, and we will not burden the Court with a lengthy discussion on this subject.

It was stipulated in the District Court on trial of these cases that, in the event plaintiffs were entitled to attorneys' fees, the Court could fix the attorneys' fees in each case at $2,500.00. (Tr. 379) We believe that this Court, under the law of Louisiana, may make an additional award for services performed on appeal or remand to the District Court for determination of the amount due.

WHEREFORE, your petitioners respectively pray that a writ of certiorari be issued out of and under the seal of this Court directed to the United States Court of Appeals for the Fifth Circuit, sitting at New Orleans, Louisiana, commanding that Court to certify and to send to this Court, on a day certain to be therein named, a full and complete transcript of the record and all proceedings had in this case numbered and entitled on its docket 19,242, to the end that this case may be reviewed and determined by this Court; that the said judgment of th United States Court of Appeals for the Fifth Circuit may be reversed by thi Court; and that your petitioners

may have such other and further relief in the premises as may seem just and proper.

And your petitioners will ever pray, etc.

Respectfully submitted,

JONES & JONES
Cameron, Louisiana

C. A. MILLER, JR.
Pioneer Building
Lake Charles, Louisiana

ROGERS & McHALE
2225 Moeling Street
Lake Charles, Louisiana

By: Robert McHale
Robert McHale

Counsel for Plaintiff-Appellants

CERTIFICATE

I, the undersigned, one of the counsel for petitioners, do hereby certify that a copy of this petition and brief in support thereof has this day been served upon respondents by mailing a copy of same to the following:

Mr. Oliver P. Stockwell
Plauche & Stockwell
Attorneys at Law
Lake Charles, Louisiana

and to:

Mr. Bernard J. Caillouet
Mr. W. J. McAnelly, Jr.
Post Office Box 626
New Orleans, Louisiana

their counsel of record, on this the 5th day of June, 1962.

Robert McHale

EXHIBIT "A"

In The

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 19242

LUCIA BONSALL, ET AL.,

Appellants,

versus

HUMBLE OIL & REFINING COMPANY, ET AL.,

Appellees.

Appeals from the United States District Court for the Western District of Louisiana.

(February 26, 1962)

Before JONES, BROWN and BELL, Circuit Judges.

PER CURIAM: This appeal challenges the correctness of the District Court's final judgment rejecting the Lessors' contention that certain Louisiana oil and gas leases were forfeited by reason of nonpayment of royalties. The case turned on, and is controlled by, Louisiana legal principles. The principal question is whether the delay of some twenty months in payment of royalties by reason of the yet-unresolved controversy over the competing supremacy of an earlier voluntary unitization agreement versus a subsequent state-imposed obligatory unitization,

Humble Oil & Refining Co. v. Jones, 1961, 241 La. 661, 130 So. 2d 408; *Humble Oil & Refining Co. v. Edwards*, 1961, 241 La. 676, 130 So. 2d 413, constituted an "active breach (thus dispensing with the necessity of an express demand for performance) under Louisiana jurisprudence reflected in such cases as *Melancon v. Texas Co.*, 1956, 230 La. 593, 89 So. 2d 135; *Bollinger v. Texas Co.*, 1957, 232, 95 So. 2d 132; and *Bailey v. Meadows*, 1961, La. App., 130 So. 2d 501, writ denied June 29, 1961. This, as well as all other pertinent questions of fact and applicable Louisiana principles, was dealt with in the able detailed memorandum opinion of the District Court. *Bonsall v. Humble Oil & Refining Co.*, W. D. La., — F. Supp. —. On the basis of the District Court's opinion and the findings and reasons discussed therein, we hold that the judgment denying forfeiture is free from error.

AFFIRMED.

A true copy

Test: *Edward W. Wadsworth*

EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit
New Orleans, Louisiana.

Apr. 4, 1962

EXHIBIT "B"

FILED

27th day of March, 1962

[231 - Brown] Clara R. James

Dy. Clerk of the United States Court of Appeals

IN THE UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 19242

LUCIA BONSALL, ET AL.,

Appellants,

Vs.

HUMBLE OIL & REFINING COMPANY,

Appellee.

Appeal from the United States District Court
for the Western District of Louisiana.

(March 27, 1962)

On Petition for Rehearing

Before JONES, BROWN and BELL, Circuit Judges.

PER CURIAM:

It is ORDERED that the petition for rehearing filed in the above entitled and numbered cause be, and the same is, hereby DENIED.

PLAT 1

T14S - R7W

T14S - R6W

Austral

Humble 190371

Mrs. E.B. Broussard, et al Humble 190374

Mrs. E. Conner Humble 190370

Donal Broussard Humble 189820, 190370

Mrs. E. Rutherford, et al Donal Broussard

Jos. Broussard

DECLARED C.P.G.U. 1
(320.00 Ac.)

Humble 190378

Humble 190373

Humble 190377

Mrs. Jos. Duhon Humble 190380

Edras Nunez

Humble 190375

Sidney Conner Humble 190379

Mrs. Malie LeBoeuf Humble 190369

Mrs. Dupree Boudoin Humble 190372

Jos. Broussard

Levia Dou

Superior

Humble 190382

DECLARED C.P.G.U. 2
(160.00 Ac.)

155.3069 Ac (Overlap)

17.8208 Ac. (Overlap)

Private Broussard

Emile Trahan (Heirs) Mrs. Julia Trahan

Pan Am

Austral

Miami Corporation

Humble

UNIT "D" SAND
(735.1151 Ac.)

11

12

7

18

14

13

221.1072 Ac.

Miami Corporation

Austral

96.5449 Ac.

131.6681 Ac.

Miami Corporation

Austral

112.6872 Ac.

Miami Corporation

Cities Service - Austral

Miami Corporation

Humble

Miami Corporation

Miami Corporation

800 0 800 1600 2400 ft

SCALE

UNIT "D" SAND
SHOWING OVERLAP OF DECLARED GAS UNITS

CHENIERE PERDUE FIELD — CAMERON PSH., LA.

HUMBLE OIL & REFINING COMPANY

PRODUCTION DEPARTMENT

NEW ORLEANS

	CIVIL ENG. DIV.	
PRIMARY DESIGN BY		
DRAWN BY	H.G. Robin	
CHECKED BY	R. Pabla	
APPROVED BY	[signature]	
REVISED		

SCALE 1" = 800

DATE 4-6-59

CIVIL ENG. DIV. FILE NO. EB-317

PLAT 2

T14S - R7W

Austgal

T14S - R6W

DECLARED C. P. G. U. 1
(320.00 Ac.)

205.972 Ac. (Overlap)

UNIT "G" SAND
(244.2899 Ac.)

116.4935 Ac.

68.5720 Ac.

12.5916 Ac.

26.0356 Ac.

Humble 190371 — Mrs. E.B. Broussard, et al, Humble 190374 — Mrs. E. Conner, Humble 190370 — Donat Broussard, Humble 189820, 190370 — Mrs. E. Rutherford, et al, Donat Broussard — Jos. Broussard — Humble 190378 — Humble 190373

Humble 190375 — Sidney Conner, Humble 190379 — Mrs. Malie LeBoeuf, Humble 190369 — Mrs. Dupree Boudoin, Humble 190372 — Jos. Broussard — Levia Duhon — Private Broussard

Humble 190377 — Mrs. Jos. Duhon, Humble 190380 — Edras Nunez — Superior — Humble 190382 — Emile Trahan (Heirs) Mrs. Julia Trahan

Miami Corporation — Austral — Pan Am — Cities Service — Austral

11 — 12 — 7 — 18 — 14 — 13

Miami Corporation — Humble — Miami Corporation — Humble

800 0 800 1600 2400 Ft.
SCALE

UNIT "G" SAND
SHOWING OVERLAP OF DECLARED GAS UNIT

CHENIERE PERDUE FIELD — CAMERON PSH., LA.

HUMBLE OIL & REFINING COMPANY
PRODUCTION DEPARTMENT
NEW ORLEANS

PRIMARY DESIGN BY	CIVIL ENG. DIV.	SCALE	1" = 800'
DRAWN BY	H.G. Robin	DATE	4-6-59
CHECKED BY		CIVIL ENG. DIV. FILE NO.	
APPROVED BY			EB - 318
REVISED			

PLAT 3

T14S - R7W

Austral

11

T14S - R6W

Humble 190371

Mrs. E.B. Broussard, et al Humble 190374

Mrs. E. Conner Humble 190370

Donet Broussard Humble 189820, 190370

Mrs. E. Rutherford, et al Donet Broussard

Jos. Broussard

Humble 190378

Humble 190373

DECLARED C.P.G.U. 1
(320.00 Ac.)

Humble 190375

Sidney Conner Humble 190379

Mrs. Malie LeBoeuf Humble 190369

Mrs. Dupree Boudoin Humble 190372

Jos. Broussard

12

Levia Duhon

Humble 190377

Mrs Jos. Duhon

Humble 190380

Edras Nunez

Superior

Humble 190382

7

18.5043 Ac. (Overlap)

Private Broussard

Austral

Emile Trahan (Heirs) Mrs. Julia Trahan

Pan Am

UNIT "H" SAND
(464.9826 Ac.)

138.4712 Ac.

Miami Corporation

Austral

118.0261 Ac.

93.5621 Ac.

Miami Corporation

Austral

96.0189 Ac.

Miami Corporation

Cities Service - Austral

18

800 0 800 1600 2400 ft

SCALE

14

Miami Corporation

13

Miami Corporation

Miami Corporation

UNIT "H" SAND
SHOWING OVERLAP OF DECLARED GAS UNIT

CHENIERE PERDUE FIELD — CAMERON PSH., LA.

HUMBLE OIL & REFINING COMPANY

PRODUCTION DEPARTMENT

NEW ORLEANS

PRIMARY DESIGN BY	CIVIL ENG. DIV	SCALE	1" = 800'
DRAWN BY	H. G. Robin	DATE	4-6-59
CHECKED BY	R. Poole	CIVIL ENG. DIV. FILE NO.	EB-319
APPROVED BY	[signature]		
REVISED			

PLAT 4

T14S - R7W

Austral

Humble Miami Corporation

Miami Corporation

Miami Corporation

Humble Miami Corporation

Humble 190371 | Mrs. E.B. Broussard, et al Humble 190374 | Mrs. E. Conger Humble 190370 | Donat Broussard Humble 189820, 190370 | Mrs. E. Rutherford, et al Donat Broussard | Jos. Broussard Humble 190378 | Humble 190373

DECLARED C.P.G.U. 1
(320.00 Ac.)

82.0068 Ac. (Overlap)

UNIT "I" SAND
(53.3877 Ac.)

31.3809 Ac.

Hum 190375 | Sidney Tanner Humble 190368 | Mrs. Malie L. Humble 190369 | Mrs. Dupree Boudoin Humble 190372 | Jos. Broussard

11 | 12 | Levia Duhon | Private Broussard

Austral

Miami Corporation

Miami Corporation

Miami Corporation

Austral

Austral

T14S - R6W

Humble 190377 | Mrs. Jos. Duhon Humble 190380 | Edras Nunez

Superior | Humble 190382 | 7

Emile Trahan (Heirs) Mrs. Julia Trahan

Pan Am.

Cities Service - Austral

18

14

13

SCALE 800 0 800 1600 2400 Ft.

UNIT "I" SAND
SHOWING OVERLAP OF DECLARED GAS UNIT

CHENIERE PERDUE FIELD. CAMERON PSH. LA.

HUMBLE OIL & REFINING COMPANY

PRODUCTION DEPARTMENT

NEW ORLEANS.

	CIVIL ENG. DIV		SCALE 1" = 800'
PRIMARY DESIGN BY			DATE 4-6-59
DRAWN BY	H. G. Robin		CIVIL ENG. DIV. FILE NO.
CHECKED BY	R. Pogle		EB-320
APPROVED BY E.B.			
REVISED			